Supreme Court, U.S.
FILED
JUL 11 1994
OFFICE OF THE CLERK

No. 94-76

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MARIA ANN VELASQUEZ,
Petitioner,
vs.
STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION THREE

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. DO "SEARCH AND SEIZURE" CONDITIONS THAT SUBJECT A PROBATIONER TO ARREST WITHOUT PROBABLE CAUSE VIOLATE A PROBATIONER'S FOURTH AMENDMENT RIGHTS IF SUCH ARRESTS ARE NOT REASONABLY RELATED TO THE GOALS OF PROBATION?

2. DOES THE RIGHT TO ARREST A PROBATIONER WITHOUT PROBABLE CAUSE EXCEED THE SCOPE OF A PROBATIONER'S CONSENT TO PROBATION CONDITIONS PERMITTING "SEARCH AND SEIZURE?"

PARTIES TO THE PROCEEDING

The parties to the proceedings below were petitioner, Maria Ann Velasquez, and respondent, Daniel E. Lungren, Attorney General of the State of California.[1]

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[1] The original party to the action was Michael Capizzi, Orange County District Attorney. The California Attorney General's Office became the respondent when petitioner appealed to the California Court of Appeal.

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

MARIA ANN VELASQUEZ,
Petitioner,
vs.
STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner, Ann Maria Velasquez, respectfully petitions that a writ of certiorari issue to review the judgement and opinion of the California Court of Appeal, Fourth Appellate District, Division Three, entered in the above entitled proceeding on December 28, 1994.

OPINIONS BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, is reported at 21 Cal.App.4th 555, and appears herein as Appendix A. The unreported order of the California Supreme Court denying a petition for review appears herein as Appendix B.

JURISDICTION

Federal issues were raised when petitioner brought a motion to suppress evidence in the trial court based on violations of both Article I, section 13, of the California Constitution and the Fourth and Fourteenth Amendments to the United States Constitution. On September 11, 1992, the trial court denied petitioner's suppression motion. (Appendix C6.)

A timely appeal was filed with the California Court of Appeal, Fourth Appellate District, Division Three. On December 28, 1993, the Court of Appeal delivered an opinion affirming the judgement, with one of the three justices dissenting. (Appendix A.)

Petitioner filed a timely petition for review with the California Supreme Court. The California Supreme Court summarily denied review on April 13, 1994, with two of the seven justices of the opinion that the petition should be granted. (Appendix B.)

This petition is timely under Rule 13.1 of the Rules of the Supreme Court of the United States because it is being filed within 90 days of the April 13, 1994, judgment denying review. The jurisdiction of this court to review the judgement of the California Court of Appeal is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant text of the constitutional provisions and statutes below is set forth in Appendix D.

U.S. Const. amend. IV.

U.S. Const. amend. XIV, § 2.

Cal. Const. art. I, sec. 13.

Cal. Health & Safety Code § 11360(a).
Cal. Penal Code § 825(a) (1)
(West 1985 & Supp. 1994).
Cal. Penal Code § 1203.1(j)
(West 1982 & Supp. 1994).
Cal. Penal Code § 1203.2(a)
(West 1982 & Supp. 1994).
Cal. Penal Code § 1538.5(a) (1)
(West 1982 & Supp. 1994).
Cal. Civil & Crim. Rules of Court § 976(c) (2)
(West 1994 Supp. Pamp.)
Cal. Civil & Crim. Rules of Court § 979(c), (d)
and (e) (West 1994 Supp. Pamp.).

STATEMENT OF THE CASE

On July 28, 1992, a felony information was filed in the Orange County Superior Court charging petitioner with a violation of California Health and Safety Code section 11360(a) (Sale or Transportation of Marijuana) and two related sentencing allegations. Petitioner entered a plea of not guilty, and the case was set for jury trial.

On September 11, 1992, a motion to suppress evidence pursuant to California Penal Code section 1538.5 was heard by the trial court. The following evidence was presented:

A Santa Ana police officer was working undercover on the afternoon of June 27, 1992, when she observed Ms. Velasquez and a male companion walk to the front of a convenience store where they remained for about 30 minutes. A man entered the store, came out, and spoke to them. Ms. Velasquez's companion retrieved a plastic bag containing a dark substance from his waistband and gave it to the man in exchange for money. Officers

arrested the man and seized the plastic bag which contained marijuana. The man said he purchased the marijuana from Ms. Velasquez's companion with a $20.00 bill.

Ms. Velasquez and her companion were arrested. In a booking search at the police department a $20.00 bill and a $1.00 bill were found on Ms. Velasquez. Her companion had a $5.00 bill and some $1.00 bills. At the time of her arrest, Ms. Velasquez was on probation for another drug offense. As a condition of probation, she specifically waived her Fourth Amendment rights and agreed to submit to any search and seizure by law enforcement officers without a warrant or probable cause.[1]

After considering the evidence, the trial court found Ms. Velasquez's arrest was without probable cause. The court denied her motion to suppress, however, because of the probation condition. On September 21, 1992, Ms. Velasquez pled guilty and was sentenced to 130 days in the Orange County Jail and three years of probation.

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[1] Petitioner's probation included the following conditions contained in two separate documents:

1) "I understand that under the Fourth and Fourteenth Amendments to the United States Constitution, I have a right to be free from unreasonable searches and seizures. I hereby waive and give up this right, and further agree for the period during which I am on probation or parole, to submit my person and property, including any residence, premises, container or vehicle under my control to search and seizure at any time of the day or night by any law enforcement, parole, or probation officer with or without a warrant, and with or without reasonable cause or reasonable suspicion."

2) "Submit your person and property, including any residence, premises, container or vehicle under your control to search and seizure at any time of the day or night by any law enforcement or probation officer with or without a warrant, and with or without reasonable cause, or reasonable suspicion."

Petitioner filed a timely appeal with the Court of Appeal of the State of California, Fourth District, Division Three, based on the erroneous denial of her suppression motion. On December 28, 1993, the Court of Appeal published a decision affirming judgement against petitioner, with one of the three justices dissenting.[2]

Petitioner filed a timely petition for review with the California Supreme Court. On April 13, 1994, the California Supreme Court denied review, with two of the seven justices of the opinion that the petition should be granted. Petitioner seeks relief by way of this petition.

STAGE OF PROCEEDINGS WHERE FEDERAL QUESTION RAISED

Trial Court:

Petitioner's moving papers stated that the suppression motion was being sought for search and seizure violations based on both the California Constitution and "pursuant to the Fourth and Fourteenth Amendments to the United States Constitution . . ." (Petitioner's opening brief).

Petitioner argued that the Fourth Amendment did not permit probationers' arrest without probable cause, and that a reasonable person would not have read the "search and seizure" conditions as a waiver of the right to be free from unlawful arrests. (Petitioner's opening brief.)

The trial court found that there was no probable cause to arrest, but denied petitioner's motion. "[S]he has waived her right to object, because of this condition of

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[2] The California Court of Appeal decided the case solely on the issue of the illegality of the arrest. (Appendix A1-3.)

probation." (Trial Court's finding and ruling on the suppression motion.)

California Court of Appeal:

In a timely appeal to the California Court of Appeal, petitioner again raised the Fourth Amendment issue. Petitioner argued that the right to arrest without probable cause violates the Fourth Amendment because it has no reasonable relationship to the goals of probation. Petitioner also maintained that no reasonable person would have interpreted the "search and seizure" conditions as a waiver of the right to be free from unlawful arrests. (Petitioner's opening brief.)

In its published decision affirming the trial court's judgement, the Court of Appeal held that "by agreeing to a search and seizure condition a probationer makes a *complete* waiver of her Fourth Amendment rights." (Appendix A4). The Court of Appeal also stated that it did "not consider it a strained interpretation of the waiver to extend it to arrests, even though an arrest is a more intrusive invasion of Fourth Amendment rights than a detention." (Appendix A4).

California Supreme Court:

In a timely petition to the California Supreme Court, petitioner again argued that the power to arrest probationers without probable cause violated the Fourth Amendment because it bore no reasonable relationship to the objectives of probation. Petitioner also asserted that no reasonable person would equate the right to search and seize with the power to arrest without probable cause. (Petitioner's opening brief).

The California Supreme Court denied review, with two of the seven justices of the opinion that the petition should be heard.

REASONS WHY THE WRIT SHOULD ISSUE

Introduction

In the instant case, petitioner was arrested without probable cause — not merely detained and searched. The California Supreme Court let stand the appellate court's ruling that this arrest was lawful based solely on petitioner's "search and seizure" status as a probationer. The appellate court grounded its decision on prior California Supreme Court cases holding that probationers give up all of their Fourth Amendment rights by agreeing to probation.

This court and lower federal courts have long-recognized constitutional rights to privacy by those on probation. The decision in the case at hand, however, unequivocally denies the existence of those rights.

If this decision is permitted to survive, countless California citizens will be subject to arrest without probable cause simply because they agreed to "search and seizure" conditions as part of their probation. This ruling extinguishes virtually all Fourth Amendment rights of probationers because it permits nearly limitless privacy intrusions that have no reasonable relationship to the objectives of probation. Furthermore, consent to illegal arrests cannot reasonably be interpreted from an agreement that allows only a "search and seizure."

I.

"SEARCH AND SEIZURE" CONDITIONS THAT SUBJECT A PROBATIONER TO ARREST WITHOUT PROBABLE CAUSE VIOLATE A PROBATIONER'S FOURTH AMENDMENT RIGHTS BECAUSE SUCH ARRESTS ARE NOT REASONABLY RELATED TO THE GOALS OF PROBATION.

Individuals are entitled to be free from unreasonable searches and seizures under both California and federal constitutional law. U.S. Const. amend. IV; Cal. Const. art. I., sec. 13.[3] Like parolees, however, probationers enjoy a "conditional liberty" that is less than the "absolute liberty" to which the average citizen is entitled. *Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987).[4] Restrictions on probationers' Fourth Amendment rights are permissible because of the "special needs" created by state government's operation of a probation system. *Id.* at 873-874.

Nevertheless, impingement on the constitutionally guaranteed privacy rights of probationers "is not unlimited." *Griffin*, 483 U.S. at 875. Those who are under state supervision for having committed crimes possess a

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[3] The police had no probable cause to arrest petitioner. (Appendix A2-3.) Therefore, the only issue was whether petitioner's status as a probationer subject to "search and seizure" conditions conferred on law enforcement the right to arrest petitioner without probable cause. (Appendix A3)

[4] For purposes of evaluating the permissible scope of a search, the distinction between that of a parolee and a probationer is constitutionally insignificant. *United States v. Davis*, 932 F.2d 752, 758 (9th Cir. 1991) (citation omitted).

"valuable" liberty deserving constitutional protections. *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972).[5] Indeed, this class shares many of the same "core values of unqualified liberty" that are possessed by all citizens. *Ibid.*[6] Depriving them of that liberty may impose a "grievous loss" to both that person and others. *Ibid.* Therefore, some probation searches may be "so unreasonable as to require that the search be held to violate the Fourth Amendment." *Latta v. Fitzharris*, 521 F.2d 246, 252 (9th Cir. 1975). To hold otherwise would conflict with the principle that those under supervision are entitled to some privacy. *Ibid.*[7]

The position by California's courts regarding the privacy rights of probationers is wholly irreconcilable with that of *Griffin* and other federal cases. In two cases dealing with searches of probationers, California's highest court held that a probationer relinquishes all of his Fourth Amendment rights by agreeing to a grant of probation. *People v. Mason*, 5 Cal.3d 759, 765-766, 488 P.2d 630, 633-634, 97 Cal.Rptr. 302, 305-306 (1971)

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[5] "It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege.' By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment." *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972).

[6] Of course, these same privacy rights apply to probationers as well as parolees. *United States v. Consuelo-Gonzalez*, 521 F.2d 246, 265 (9th Cir. 1975). "A probationer, like the parolee, has the right to enjoy a significant degree of privacy." *Ibid* (citation omitted). Indeed, probationers may possess greater privacy rights than do parolees. *United States v. Cardona*, 903 F.2d 60, 63 (1st Cir. 1990) (citation omitted).

[7] Also, providing authorities with an "unlimited power to conduct indiscriminate searches actually undermines the rehabilitation process." *Latta*, 521 F.2d at 252 (citations omitted).

(footnote omitted); *People v. Bravo*, 43 Cal.3d 600, 607, 609-610, 738 P.2d 336, 340, 342, 238 Cal.Rptr. 282, 286-288 (1987).[8] The California Supreme Court cited no federal cases to support this extraordinary proposition. *Ibid.*[9] Although the appellate court's decision upholding the denial of the suppression motion in the case at hand was grounded on this same erroneous theory, it went much further. (Appendix A4.) The appellate court held that "search and seizure" conditions result in a complete waiver of Fourth Amendment rights relating not only to searches, but also to arrests. *Ibid.*[10]

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[8] "Thus, a probationer who has been granted the privilege of probation on condition that he submit at any time to a warrantless search may have no reasonable expectation of traditional Fourth Amendment protection." *Mason*, 5 Cal.3d at 765, 488 P.2d at 633, 97 Cal.Rptr. at 305 (footnote omitted).

"We find no reason to conclude that a defendant who in order to obtain probation specifically agreed to submit to search 'with or without a warrant at any time' has waived only the right to demand a warrant. Rather, as we stated in *Mason*, the defendant has voluntarily waived 'whatever claim of privacy he might otherwise have had.' " *Bravo*, 43 Cal.3d at 610, 738 P.2d at 342, 238 Cal.Rptr. at 288 (citation omitted).

Only searches undertaken for harassment or for "arbitrary or capricious reasons" are prohibited under the *Mason* and *Bravo* analysis. *Bravo*, 43 Cal.3d at 610, 738 P.2d at 342, 238 Cal.Rptr. at 288 (citation omitted).

[9] The *Bravo* court simply cited *Mason* to support its holding. Neither case referenced any federal authority. *Bravo*, 43 Cal.3d at 607, 609-610, 738 P.2d at 340, 342, 238 Cal.Rptr. at 286, 288, *Mason*, 5 Cal.3d at 765, 488 P.2d at 633, 97 Cal.Rptr. at 305.

[10] "We do not consider it a strained interpretation of the waiver to extend it to arrests, even though an arrest is a more intrusive invasion of Fourth Amendment rights than a detention. *Bravo* emphasized that by agreeing to a search condition a probationer makes a *complete* waiver of her Fourth Amendment rights. (*Bravo* at p. 607.)" (Appendix A4.)

Several federal courts have considered the issue of the extent of a defendant's waiver of Fourth Amendment rights as a condition of probation. Not once, however, has a court addressed the constitutionality of the right to arrest a probationer without probable cause.[11] For example, in *Griffin* this Court upheld a search of the defendant's residence based on a showing of suspicion amounting only to "reasonable grounds." *Griffin*, 483 U.S. at 872. This Court found the state's probation restrictions justifiable because they were designed to assure "a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large." *Griffin*, 483 U.S. at 876 (citation omitted).[12]

Likewise, the "guiding principle" for the Federal Probation Act is only to permit conditions that "can reasonably be said to contribute significantly both to the rehabilitation of the convicted person and to the

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[11] For example, *see Griffin*, 483 U.S. at 872-874, *United States v. Giannetta*, 909 F.2d 571, 574-575 (1st Cir. 1990); *United States v. Cardona*, 903 F.2d 60, 61 (1st Cir. 1990); *United States v. Terringo*, 838 F.2d 371, 374 (9th Cir 1988); *Higdon v. United States*, 627 F.2d 752, 758 (9th Cir. 1980); *United States v. Pierce*, 561 F.2d 735, 739-740 (9th Cir. 1977); *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 264 (9th Cir. 1975).

Except for the instant case, the only California case to determine whether a probationer may be arrested without probable cause was *People v. Rooters*, 7 Cal.App.4th 1032 (1992). Although *Rooters* prohibited such arrests, the California Supreme Court ordered *Rooters* de-published on October 1, 1992. Cal. Civil & Crim. Rules of Court § 976(c) (2) and § 979(c), (d) & (e) (West 1994 Supp. Pamp.).

[12] Of course, *Griffin* did not confront the issue of arrests founded on less than probable cause. *Griffin* emphasized that it was unsettled even whether "*any* search of a probationer's home by a probation officer is lawful" based merely on "reasonable grounds." *Griffin*, 483 U.S. at 880.

protection of the public." *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 264 (9th Cir. 1975). These guidelines are nearly identical to those used to justify the imposition of terms for California probationers. *Mason*, 5 Cal.3d at 763, 488 P.2d at 632, 97 Cal.Rptr. at 304.[13]

The ability of law enforcement officers to detain and search a probationer without reasonable suspicion accomplishes these dual goals of probation while protecting traditional Fourth Amendment rights.[14] By detaining and searching, an officer can make a speedy determination as to whether that person is obeying their probation terms. The officer also can easily discover any threat the probationer may pose to the public.

An arrest, however, is not an effort by an officer either to ascertain a probationer's compliance with probation or to protect the public by detecting crimes. Instead, it is the result of a conclusion by an officer that the individual already has committed an unlawful act — either by violating probation or by committing a new offense. Thus, arrest conditions imposed on probationers have no reasonable relationship to the purpose of probation.

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[13] In *Mason*, the California Supreme Court made it clear that the purpose of a search condition is "to deter further offenses by the probationer and to ascertain whether he is complying with the terms of his probation." *Mason*, 5 Cal.3d at 763 488 P.2d at 632, 97 Cal.Rptr. at 304 (citation omitted). Indeed, the California Legislature designed probation for the "reformation and rehabilitation of the probationer. . . ." Cal. Penal Code § 1203.1.(j) (West 1982 & Supp. 1994).

[14] The "long-prevailing standards [of probable cause] seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime." *Brinegar v. United States*, 838 U.S. 160, 175-176 (1949).

Requiring a probationer to submit to an unlawful search "should not be the price of probation." *Consuelo-Gonzalez*, 521 F.2d at 265. That is even more true for probation cases involving unlawful arrests, where the privacy intrusions are immeasurably greater than those surrounding searches.

II.

THE RIGHT TO ARREST A PROBATIONER WITHOUT PROBABLE CAUSE EXCEEDS THE SCOPE OF A PROBATIONER'S CONSENT TO PROBATION CONDITIONS PERMITTING "SEARCH AND SEIZURE."

Assuming, arguendo, that the right to arrest without probable cause is a reasonable probation term that does not violate a probationer's Fourth Amendment privacy rights, no reasonable objective person would have believed that they were subject to that condition in the case at hand.

The seizure of evidence pursuant to a valid consent does not violate the Fourth Amendment. *Washington v. Chrisman*, 455 U.S. 1, 9-10 (1982). The scope of a consent search, however, "is limited by the terms of its authorization." *Walter v. United States*, 447 U.S. 649, 656-657 (1980) (footnote omitted).

Under the Fourth Amendment, an objective standard is used for measuring the breadth of a consent search. *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (citation omitted). This involves determining what the "typical reasonable person" would have understood by the exchange that led to the consent. *Ibid.* This same objective

test is used by California courts to calculate the scope of a probationer's consent to search conditions. *Bravo*, 43 Cal.3d at 606-607, 738 P.2d at 338-339, 238 Cal.Rptr. 285-286.[15]

The arrest of petitioner in the present case clearly exceeded the scope of her consent. No reasonable person would interpret the condition contained in the probation terms to mean that petitioner consented to being *arrested* anywhere, at any time of the day or night, without probable cause.[16] Petitioner's waiver uses the words "search" and "seizure." The word "arrest" is not stated anywhere. Consequently, a "typical reasonable

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[15] *Bravo* held that an objective test is applied to determine the scope of a probationer's consent to a search condition. *Bravo*, 43 Cal.3d at 606-607, 738 P.2d at 338-339, 238 Cal.Rptr. at 285-286. The condition is to be given the "meaning that would appear to a reasonable, objective reader." *Id.* at 606, 738 P.2d at 339, 238 Cal.Rptr. at 285. A search condition "must therefore be interpreted on the basis of what a reasonable person would understand from the language of the condition itself,. . . ." *Id.* at 607, 738 P.2d at 339-340, 238 Cal.Rptr. at 286.

[16] Petitioner's probation included the following conditions contained in two separate documents:

1) "I understand that under the Fourth and Fourteenth Amendments to the United States Constitution, I have a right to be free from unreasonable searches and seizures. I hereby waive and give up this right, and further agree for the period during which I am on probation or parole, to submit my person and property, including any residence, premises, container or vehicle under my control to search and seizure at any time of the day or night by any law enforcement, parole, or probation officer with or without a warrant, and with or without reasonable cause or reasonable suspicion."

2) "Submit your person and property, including any residence, premises, container or vehicle under your control to search and seizure at any time of the day or night by any law enforcement or probation officer with or without a warrant, and with or without reasonable cause, or reasonable suspicion."

person" would have to equate the term "search and seizure" with the concept of arrest for this condition to be binding on petitioner. No reasonable person, however, would make that correlation.[17]

There is a substantial distinction between the inconvenience of a temporary detention and the acute loss of liberty accompanying an arrest.[18] Detentions are short in duration, strictly limited in breadth, and result in relatively narrow intrusions on one's privacy rights. *In re James*, 43 Cal.3d 903, 911, 741 P.2d 161, 164, 239 Cal. Rptr. 663, 667 (1987) (citation omitted). An arrest, however, differs markedly in the scope and degree of intrusion it imposes upon an individual's liberty. *In re Tony C.*, 21 Cal.3d 888, 892, 582 P.2d 957, 959, 148 Cal.Rptr. 366, 368 (1978) (citation omitted). When arrested, an individual is transported to a police station, booked and incarcerated. *Ibid.* Indeed, the distinction between being detained and being arrested is comparable to the difference in being temporarily stopped, and imprisoned.

Considerable harm will be done to probationers who can be arrested at any time of the day or night without probable cause. In addition to the humiliation of arrest, such probationers likely will suffer the penalty of an

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[17] Indeed, California Penal Code section 1203.2(a) requires probable cause before arresting probationers who are suspected of violating their probation. (Cal. Penal Code § 1203.2(a) (West 1982 & Supp. 1994).

[18] A temporary detention does not conflict with the Fourth Amendment because it protects "the innocent from the risk of arrest when no more than reasonable investigation is justified." *People v. Mickelson*, 59 Cal.2d 448, 452, 380 P.2d 658, 660, 30 Cal.Rptr. 18, 20 (1963) (citation omitted).

unlawful confinement for at least two days before their arraignments.[19]

It takes no imagination to foresee the numerous combinations of potential injustices that would befall probationers who are subject to arrest without probable cause. For example, the unlawful confinement could result in the interruption or termination of a probationer's employment, impounding of their vehicles and innumerable child care obstacles. No doubt, the few probationers who were fortunate enough to afford bail would believe themselves compelled to go to that trouble and expense.

Unlike a detention, an arrest imposes monumental intrusions on a person's privacy. For that reason, no probationer would believe that they were subjecting themselves to an arrest merely because they agreed to a "search and seizure" condition that fails even to mention the word "arrest." An arrest simply is not the kind of "seizure" that an objective person would envision when reviewing the conditions of probation in the case at hand.

CONCLUSION

The instant case effectively erases from the Constitution all Fourth Amendment rights of probationers. In so doing, the present case directly contradicts this Court's holding in *Griffin* that probationers' privacy rights are protected by the Fourth Amendment. Furthermore,

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[19] Under Penal Code section 825(a) (1), a person must be brought before a magistrate within two days of their arrest. Sundays and holidays are not included when computing that two day period. Cal. Penal Code § 825(a) (1) (West 1985 & Supp. 994).

illegal arrests can never serve the legitimate objectives of probation.

Even if the constitution permitted consent to an unlawful arrest as a probation condition, a probationer would not do so merely by agreeing to search and seizure terms such as those contained in the instant case. Far more specific language is required before consent to an unlawful arrest reasonably can be inferred from such wording. If the right to arrest a person anywhere at anytime is contemplated in a probation order, then at minimum the word "arrest" should appear in the language imposing that condition.

For all of the foregoing reasons, petitioner respectfully requests that this Court grant her petition for certiorari.

DATED: July 7, 1994.

Respectfully submitted,

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APPENDIX A

APPENDIX A

CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT
DIVISION THREE

No. G013337
December 28, 1993
[21 Cal.App.4th 555, __ Cal.Rptr.2d __]

THE PEOPLE,
Plaintiff and Respondent,
v.
MARIA ANN VELASQUEZ,
Defendant and Appellant.

OPINION

WALLIN, J. — Maria Ann Velasquez appeals her conviction for sale of marijuana. (Health & Saf. Code, § 11360, subd. (a).) She pleaded guilty after her motion to suppress evidence on the grounds of an illegal arrest was denied. (Pen. Code, § 1538.5.) She was on probation at the time of the arrest. One of the probation conditions was a waiver of her Fourth Amendment rights and consent to searches and seizures.[1] On appeal, she

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[1] Velasquez initialed each of the following provisions on March 22, 1990, when she pleaded guilty to a violation of Health and Safety Code section 11357, subdivision (c): "I understand that under the Fourth and Fourteenth Amendments to the United States Constitution, I have a right to be free from unreasonable searches and seizures. I hereby waive and give up this right, and further agree for the period during which I am on probation or parole, to submit my person and property, including any residence, premises, container or vehicle under my control to search and seizure at any time of the day or night by any law enforcement, parole, or probation officer with or without a warrant, and with or without reason-

(continued)

contends the waiver does not extend to searches incident to an illegal arrest. We affirm.

A Santa Ana police officer was working undercover on the afternoon of June 27, 1992, when she observed Velasquez and a male companion walk to the front of a convenience store where they remained for about 30 minutes. A man entered the store, came out, and spoke to them. Velasquez's companion retrieved a plastic bag containing a dark substance from his waistband and gave it to the man in exchange for money. Officers arrested the man and seized the plastic bag which contained marijuana. The man said he purchased the marijuana from Velasquez's companion with a $20 bill.

Velasquez and her companion were arrested. In a booking search at the police department a $20 bill and a $1 bill were found on Velasquez. Her companion had a $5 bill and some $1 bills. At the time of her arrest, Velasquez was on probation for another drug offense. As a condition of probation, she specifically waived her Fourth Amendment rights and agreed to submit to any search and seizure by law enforcement officers without a warrant or probable cause. The trial court found Velasquez's arrest was without probable cause, but refused to suppress the evidence because of the probation condition.

(1a) The People concede that Velasquez's arrest lacked probable cause, but argue that she consented to seizures of her person, including arrests without probable cause, when she accepted probation conditioned

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(fn. continued)
able cause of reasonable suspicion."

"Submit your person and property, including any residence, premises, container or vehicle under your control to search and seizure at any time of the day or night by any law enforcement or probation officer with or without a warrant, and with or without reasonable cause, or reasonable suspicion."

upon a search and seizure provision. Any subsequent search of her person under the probation condition was legitimate.

The sole issue here is whether by consenting to the search and seizure condition Velasquez waived the right to assert the illegality of her arrest. **(2)** The Fourth Amendment protects against unlawful searches and seizures. However, its protections may be waived. "[A] probationer who has been granted the privilege of probation on condition that he submit at any time to a warrantless search may have no reasonable expectation of traditional Fourth Amendment protection." (*People v. Mason* (1971) 5 Cal.3d 759, 765 [97 Cal.Rptr. 302, 488 P.2d 630].) In *People v. Bravo* (1987) 43 Cal.3d 600 [238 Cal.Rptr. 282, 738 P.2d 336] the Supreme Court held a probationer's agreement to " 'submit his person and property to search or seizure at any time of the day or night by any law enforcement officer with or without a warrant[,]' " was a complete waiver of his Fourth Amendment rights, "save only his right to object to harassment or searches conducted in an unreasonable manner." (*Id.* at pp. 602, 707.) Furthermore, the officer need not be aware of the waiver at the time of the search and seizure. (*People v. Viers* (1991) 1 Cal.App.4th 990, 993 [2 Cal.Rptr. 667]; *In re Marcellus L.* (1991) 229 Cal.App.3d 134, 143 [279 Cal.Rptr. 902].) The search need only be objectively reasonable and cannot be undertaken for harassment or "for arbitrary or capricious reasons." (*People v. Bravo, supra*, 43 Cal.3d at p. 610.)

Recently, in *People v. Viers, supra*, 1 Cal.App.4th 990, we held the identical probation condition precluded a probationer from challenging the legality of a detention. "Although all of the published law has dealt with the lawfulness of *searches*, the cases speak broadly of a waiver of 'Fourth Amendment protection.' [Citations.] Permission to detain is implicit in most Fourth

Amendment waivers. A detention is a seizure of the person which is subject to Fourth Amendment protection. [Citation.]" (*Id.* at pp. 993-994.) An arrest is also a seizure subject to Fourth Amendment protections. (See *Wilson v. Superior Court* (1983) 34 Cal.3d 777, 784 [195 Cal.Rptr. 671, 670 P.2d 325], the three levels of police contacts subject to Fourth Amendment protections are consensual encounter, investigative detention, and arrest].) The question is whether an arrest is beyond the scope of the waiver.

In *People v. Bravo, supra*, 43 Cal.3d 600, the court noted the scope of a probationer's waiver of her Fourth Amendment rights must be based on an objective test. The condition "must therefore be interpreted on the basis of what a reasonable person would understand from the language of the condition itself, not on the basis of [the probationer's] subjective understanding, or under a strict test in which a presumption against waiver is applied." (*Id.* at p. 607.) **(1b)** We do not consider it a strained interpretation of the waiver to extend it to arrests, even though an arrest is a more intrusive invasion of Fourth Amendment rights than a detention. *Bravo* emphasized that by agreeing to a search and seizure condition a probationer makes a *complete* waiver of her Fourth Amendment rights. (*Ibid.*)

We hold here today only that by waiving her Fourth Amendment rights Velasquez has waived her right to seek suppression of evidence seized during the search incident to her arrest. Our holding does not leave a probationer without protection. Any search or seizure must still be viewed by the standards of *Bravo*. A detention or arrest may not be undertaken for harassment, must have a legitimate law enforcement purpose, and must not be undertaken for arbitrary or capricious reasons. (43 Cal.3d at p. 610.) Furthermore, nothing in

our opinion precludes a probationer from pursuing civil remedies for illegal police conduct.

Our dissenting colleague argues that any illegal arrest is necessarily one which has no legitimate law enforcement purpose and therefore can never be within the scope of a Fourth Amendment waiver. We disagree. A simple detention and search at the scene of an observed narcotics transaction is not harassment with no legitimate law enforcement purpose. Perhaps had the officers searched Velasquez but found nothing and arrested her anyway, she would have cause to complain of harassment.

But here, the officers believed they had observed a drug sale take place and arrested Velasquez accordingly, discovering the challenged evidence during the search incident to that arrest. The police did not know Velasquez was under a search and seizure condition. We cannot say Velasquez's arrest was without a legitimate law enforcement purpose, or that it was undertaken to harass. Just as she would not have been entitled to seek suppression of the evidence had it been discovered during a detention search (*People v. Viers, surpa*, 1 Cal.App.4th at pp. 993-994), Velasquez may not seek suppression of the evidence found during a search incident to her arrest.

The judgment is affirmed.

Sills, P. J., concurred.

CROSBY J., Dissenting. "Round up the usual suspects!" These words, once as foreign to American justice as Casablanca is to Santa Ana, may become commonplace if today's ill-advised decision ever becomes the law of the land.

My research has turned up no reported decision approving an otherwise illegal arrest merely because it turns out the arrestee has consented to probation searches. Nor would one expect to find one, since a "search condition must [ ] be interpreted on the basis of what a reasonable person would understand from the language of the condition itself . . . ." (*People v. Bravo* (1987) 43 Cal.3d 600, 607 [238 Cal.Rptr 282, 738 P.2d 336].) No reasonable person would expect a waiver of the right to be free from searches and seizures without cause or warrant to include a waiver of the right to be free from illegal arrests. This court's questionable opinion in *People v. Viers* (1991) 1 Cal.App.4th 990 [2 Cal.Rptr.2d 667] pushed the Fourth Amendment to the outer limit; now the majority simply erases it from the Constitution. Even in *Bravo*, the Supreme Court limited probation searches to "rehabilitative and reformative purposes of probation or other legitimate law enforcement purposes." (*People v. Bravo, supra*, at p. 610.) Illegal arrests are not "legitimate law enforcement purposes."

I would reverse.

APPENDIX B

Fourth Appellate District, Division Three, No. G013337
S037663

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
APR 13 1994
Robert Wandruff Clerk

Deputy

THE PEOPLE, Respondent

v.

MARIA ANN VELASQUEZ, Appellant

Petition for review DENIED.

Mosk, J. and Kennard, J. are of the opinion the petition should be granted.

Lucas
Chief Justice

APPENDIX C

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE
DEPARTMENT 47

THE PEOPLE OF THE STATE
OF CALIFORNIA
Plaintiff,
vs.
MARIA ANN VELASQUEZ,
Defendant.

CASE NO. C94544
1538.5 MOTION

HONORABLE JOHN M. WATSON, JUDGE

REPORTER'S TRANSCRIPT

SEPTEMBER 11, 1992

APPEARANCES OF COUNSEL:

FOR THE PEOPLE:	THOMAS E. DUNN, JR. DEPUTY DISTRICT ATTORNEY
FOR THE DEFENDANT:	BROOKS TALLEY DEPUTY PUBLIC DEFENDER

DEBORA K. PINKHAM, C.S.R. #4814
OFFICIAL COURT REPORTER

Santa Ana, California - Friday, September 11, 1992

(The following proceedings were had in open court:)
(Morning Session.)

THE COURT: People vesus Velasquez.

Is she present?

MR. TALLEY: Yes, she is.

THE COURT: Do you speak English, Miss Velasquez?

THE DEFENDANT: Yes.

THE COURT: All Right. The record will reflect that she's present with counsel. The people are represented.

Your appearances.

MR. DUNN: Tom Dunn for the People, your Honor. We're ready.

THE COURT: And the record will reflect that Mr. Talley has filed, and I have read and considered, a nine-page motion to suppress pursuant to section 1538.5. Mr. Dunn has responded with eleven pages, which is a response together with attachments, consisting principally of court records concerning Miss Velasquez's terms and conditions of the probation.

MR. DUNN: Excuse me your Honor. The People ask that the court would take judicial notice of those attachments to the People's response.

THE COURT: Any objection, Mr. Talley?

MR. TALLEY: None. Thank you.

THE COURT: Yes. I do take judicial notice of them.

We've also had a conversation in chambers. And during that conversation it's been agreed that, with one modification or addition — I should say, with one addition, that both sides stipulate that the percipient

witnesses be deemed to have been called, sworn and to have testified to the set of facts contained in the defense statement of the case. Is that correct, Mr. Dunn?

MR. DUNN: That's correct, your Honor.

THE COURT: Mr. Talley?

MR. TALLEY: Yes, it is.

THE COURT: And the additional agreed stipulation was that Miss Velasquez was in fact arrested when the police first approached her, as opposed to being detained or questioned or any other legal status. It was an arrest.

MR. TALLEY: That's correct, your Honor.

MR. DUNN: We'll stipulate to that as well.

THE COURT: All right. The court accepts that.

MR. DUNN: Your Honor, may the People make a couple of preliminary quick addendums?

THE COURT: Sure.

MR. DUNN: Just real quick.

I had talked about not only the defendant's waiver in my response, but also the court order. And, I took the court order from the second page of the Tahl Form, which is the next-to-the-last page of the attachments. However, just so the record is clear, I wanted to point out to the court that earlier in those documents, it appears to be on the disposition minute order, there's a little bit different language. I don't think it really makes a whole lot of difference.

But, on the disposition minute order dated March 22nd, 1990, the language actually is, "submit to search and seizure of your person," et cetera.

THE COURT: Slow down a minute, Mr. Dunn.

MR. DUNN: Sure.

THE COURT: I have that page, but I don't know where you're reading from.

MR. DUNN: Yeah, I'm sorry. It's under "Conditions," on the left side of the page. And it's the second box that's checked, the first one being, "violate no law."

THE COURT: Maybe I'm not on the right page.

The one I have before me —

They're all numbered. Does it have a number?

MR. DUNN: May I approach, your Honor?

THE COURT: Yes. I don't know if I'm — maybe I'm not looking at the right thing.

MR. DUNN: Oh, Okay. Yes.

It's the very next page.

With regards to that page, your Honor, the second condition which has an "X" there is, "submit to search and seizure of your person." And then it closes, "with or without probable cause."

So, it doesn't have the additional language in the order itself, it just has, "without probable cause."

THE COURT: And you're contrasting that to what?

MR. DUNN: Well, in my papers I indicated that the waiver was, "with or without reasonable cause or reasonable suspicion." And although that language is in Miss Velasquez's waiver on page one of the Tahl Form, under number 10, it is not actually in the order.

As I say, I don't think it really makes that much difference.

THE COURT: I understand. I appreciate your pointing that out.

Is there anything else you wanted to bring to my attention?

MR. DUNN: One other thing, your Honor. Just in the haste or writing the response, I referred to the court of appeal opinion in the *Bravo* case. And I think to be technically correct I should have referred to the Court of

Appeal majority opinion, because Justice Sonenshine wrote a dissent that was adopted by the California Supreme Court.

So, any references to the Court of Appeal, I'm sure the court understands anyway, but it should indicate that was the majority view.

THE COURT: All right.

MR. DUNN: We have nothing further as a preliminary matter.

THE COURT: All right. Mr. Talley, do you wish to be heard further?

MR. TALLEY: Yes. Thank you, your Honor. Just briefly.

It would be our position that the defendant did not waive her right to be arrested without probable cause, despite the statement there on the Tahl Form. As *Bravo* indicates, there's an objective standard of the reasonable person, and whether they would understand from the language of the condition itself. That's not an attorney or somebody with a legal background, but just a reasonable person.

And, on this pre-printed boiler plate form, somebody who submits to search and seizure, at any time, with or without probable cause, I don't think they would understand that that means they may be arrested, that is handcuffed, placed in the back of a unit, transported to a police station, and actually incarcerated, without any reasonable suspicious or probable cause. I think that would be an unreasonable reading of this waiver.

I think the *Rooters* court quite correctly states there's a substantial distinction to be drawn between detentions and arrests. And that's what this does. This waiver exceeds the scope of, I think, the reasonable interpretation of that probation condition.

And, based on that argument I would submit.

MR. DUNN: Very briefly, your Honor. The order does say, "submit your person to seizure without probable cause." And I don't see how any reasonable person could construe that to mean anything other than what the *Viers* court seems to think it means.

With that remark, I think the papers are clear, I'll submit it.

THE COURT: All right. Yes, they are. Both are very good pieces of work, and very clear in their points. And, obviously diametrically opposed with the split in the Districts.

As far as, Mr. Talley, your first point that whether or not — you raise a question of whether or not the police had probable cause to arrest your client, it's my finding that they did not have that.

However, having said that, I am persuaded by the prosecution that she has waived her right to object, because of this condition of probation. And, based on that, your motion is denied.

If it turns out on appeal — if there is an appeal, if it turns out I've selected the wrong district court to follow, at least you have your ruling that there was no probable cause for arrest.

MR. TALLEY: Thank you, your Honor. Appreciate your consideration.

THE COURT: You're welcome. Trial date to remain.

(CONCLUSION OF PROCEEDINGS.)

STATE OF CALIFORNIA)
) ss.
COUNTY OF ORANGE)

I DEBORA KAY PINKHAM, C.S.R. #4814, do hereby certify that the within and foregong transcript consisting of pages 1 through 7 is a full, true and correct transcript of my shorthand notes thereof, and a full, true and correct statement of the testimony of proceedings had in said cause.

/s/ Debora Kay Pinkham,
Debora Kay Pinkham,
C.S.R. #4814
Official Court Reporter

Dated: 9-15-92

APPENDIX D

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

FEDERAL CONSTITUTIONAL PROVISIONS:

1. The Fourth Amendment to the United States Constitution provides in relevant part:

> "The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

2. The Fourteenth Amendment to the United States Constitution provides in relevant part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . ." U.S. Const. amend. XIV, § 2.

STATE CONSTITUTIONAL PROVISIONS:

Article I, section 13 of the California Constitution states in relevant part:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized." Cal. Const. art. I, sec. 13.

STATE STATUTES:

California Health and Safety Code section 11360(a) states in relevant part:

> "[E]very person who transports, . . . sells, furnishes, administers, or gives away, or offers to transport, . . . sell, furnish, administer, or give away, or attempts to . . . transport any marijuana shall be punished by imprisonment in the state prison for a period of two, three or four years." Cal. Health & Safety Code § 11360(a).

California Penal Code section 825(a) states in relevant part:

> "[T]he defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his or her arrest, excluding Sundays and holidays; provided, however, that when the two days prescribed herein expire at a time when the court is which the magistrate is sitting is not in session, such time shall be extended to include the duration of the next regular court session on the judicial day immediately following." Cal. Penal Code § 825(a) (1) (West 1985 & Supp. 1994).

California Penal Code section 1203.1(j) states in relevant part:

> "The court may impose and require any . . . reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and

generally and specifically for the reformation and rehabilitation of the probationer, . . ." Cal. Penal Code § 1203.1(j) (West 1982 & Supp. 1994).

California Penal Code section 1203.2(a) states in relevant part:

"At any time during the probationary period of a person released on probation . . . if any probation officer or peace officer has probable cause to believe that the probationer is violating any term or condition of his or her probation or conditional release, the officer may, without warrant or other process and at any time until the final disposition of the case, rearrest the person and bring him or her before the court . . ." Cal. Penal Code § 1203.2(a) (West 1982 & Supp. 1994).

California Penal Code section 1538.5(a) (1) states in relevant part:

"(a) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:

(1) The search or seizure without a warrant was unreasonable." Cal. Penal Code § 1538.5(a) (1) (West 1982 & Supp. 1994).

STATE RULES OF COURT:

California Civil and Criminal Rules of Court section 976(c) (2) states in relevant part:

> "An opinion certified for publication shall not be published, . . . on an order of the Supreme Court to that effect." Cal. Civil & Crim. Rules of Court § 976(c) (2) (West 1994 Supp. Pamp.)

California Civil and Criminal Rules of Court section 979(c), (d) and (e) states in relevant part:

> (c) "When a request for depublication is received by the Supreme Court . . . the court shall either order the opinion depublished or deny the request."
>
> (d) "Nothing in this rule limits the court's power, on its own motion, to order an opinion depublished."
>
> (e) "An order of the Supreme Court directing depublication of an opinion in the Official Reports shall not be deemed an expression of opinion of the Supreme Court of the correctness of the result reached by the decision or of any of the law set forth in the opinion." Cal. Civil & Crim. Rules of Court § 979(c), (d) and (e) (West 1994 Supp. Pamp.).